

1 ADVISORY OPINION 2012-25

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DRAFT D

10 Dear Messrs. Torchinsky and Bayes:

11 We are responding to your advisory opinion request on behalf of American Future
12 Fund ("AFF") and American Future Fund Political Action ("AFFPA") (collectively,
13 "Requestors"), concerning the application of the Federal Election Campaign Act (the
14 "Act") and Commission regulations to your proposed joint fundraising efforts.¹

15 The Commission concludes that the proposed joint fundraising committees may
16 operate consistent with the Act and Commission regulations.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 April 11, 2012, and emails received on July 24, 2012, and September 17, 2012.

20 AFF is an incorporated non-profit social welfare organization exempt from
21 taxation under section 501(c)(4) of the Internal Revenue Code. AFFPA is registered with
22 the Commission as a multicandidate, nonconnected political committee. AFFPA plans to
23 establish a non-contribution account that would solicit and receive unlimited
24 contributions from individuals, corporations, and labor organizations for the purpose of

¹ The original advisory opinion request also inquired as to joint fundraising efforts between AFF, AFFPA, and a Federal candidate or officeholder's authorized campaign committee. On June 19, 2012, after the Office of General Counsel raised the issue of the absence of a Federal candidate, Mr. David McIntosh – who ran in the primary for U.S. House of Representatives for the 5th District of Indiana – was added as an additional requestor to the advisory opinion request. On October 1, 2012, however, Requestors withdrew their original questions regarding joint fundraising activities involving a Federal candidate or officeholder's authorized campaign committee.

1 financing its independent political activity.² AFF and AFFPA have some overlapping
2 management, but AFFPA is not registered as a separate segregated fund connected to
3 AFF. Requestors represent that they operate separately and are not affiliated with each
4 other under Commission regulations.

5 The proposed joint fundraising committees ("Joint Committees") may include one
6 or more of the following participants: AFF, AFFPA, AFFPA's non-contribution account,
7 and an independent expenditure only political committee ("IEOPC").³

8 Each Joint Committee would be established as separate political committees that
9 would act as the fundraising representative of all the participants. The Joint Committees
10 would establish separate depository accounts. In one account, each Joint Committee
11 would deposit funds raised for AFFPA. In another account, each Joint Committee would
12 deposit funds raised for AFF, AFFPA's non-contribution account, and a participating
13 IEOPC. Each participant would accept only funds that it may lawfully receive under the
14 Act.

15 The participants plan to execute a written agreement that would specify how the
16 expenses of and contributions received by each Joint Committee would be allocated
17 among the participants, and propose two different combinations of participants in the
18 Joint Committees.

19 *1. AFF and AFFPA*

² See Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, Oct. 5, 2011, <http://www.fec.gov/press20111006postcarey.shtml>.

³ Requestors represent that any IEOPC would accept funds consistent with Advisory Opinion 2010-11 (Commonsense Ten), in which the Commission stated that a nonconnected political committee may raise and spend funds outside the limitations of the Act from individuals, other political committees, corporations, and labor organizations for the purpose of financing independent expenditures. Requestors represent that any IEOPC that participates in a Joint Committee would (1) report to the Commission as an IEOPC, and (2) not be affiliated with AFFPA.

1 This proposed Joint Committee would allocate the first \$5,000 received from
2 individuals to AFFPA, while contributions received from individuals in excess of \$5,000
3 would be allocated to AFF. All corporate and labor organization contributions would be
4 allocated to AFF.

5 This Joint Committee's pre-event publicity and solicitations would specify that
6 AFFPA is raising funds for use in connection with Federal elections, and that AFF is
7 raising funds to be used in a manner consistent with its status as a section 501(c)(4) social
8 welfare organization.

9 2. AFF, AFFPA, AFFPA's non-contribution account and/or an IEOPC

10
11 This proposed Joint Committee would allocate the first \$5,000 received from
12 individuals to AFFPA. Any amounts in excess of \$5,000 received from individuals, as
13 well as all corporate and labor organization contributions received, would be split evenly
14 between AFF, AFFPA's non-contribution account, and/or an IEOPC.

15 Under both proposals, the Joint Committee participants would specify in a written
16 agreement how the fundraising proceeds will be allocated. The Joint Committee would
17 also keep records and file reports as required by 11 CFR 102.17(c)(4) and (8).

18 The joint fundraising expenses would be allocated to the participants in
19 proportion to the funds raised and distributed to each participant. Each participant would
20 pay its own fundraising expenses. To the extent that advanced funds are needed,
21 Requestors have not determined with any specificity how, or by what method, those
22 funds will be advanced.

23 Under both proposals, the Joint Committee would solicit funds in writing and/or
24 by telephone, or other forms of direct contact. They would also hold one or more

fundraising events, although no funds would be solicited at the fundraising events. All solicitations for contributions would include a fundraising notice with the information required by 11 CFR 102.17.

Solicitations by the Joint Committee involving AFFPA's non-contribution account or an IEOPC would not indicate how AFFPA's non-contribution account or the IEOPC would use the funds received.

Question Presented

1. *May AFF and AFFPA serve as participants in a joint fundraising committee?*

2. *May AFF, AFFPA, AFFPA's non-contribution account, and/or an IEOPC serve as participants in a joint fundraising committee?*

Legal Analysis and Conclusions⁴

Question 1: May AFF and AFFPA serve as participants in a joint fundraising committee?

Yes, AFF and AFFPA may serve as participants in the Joint Committee as described.

Commission regulations allow a political committee to "engage in joint fundraising with other political committees or with unregistered committees or organizations." 11 CFR 102.17(a)(1)(i). The regulations further specify that participants may include political party committees (including non-Federal party committees),

⁴ The Commission notes that this advisory opinion implicates issues that may also be the subject of a forthcoming Commission rulemaking in light of the court rulings in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

1 candidate committees, multicandidate committees, and unregistered organizations that are
2 not collecting agents under 11 CFR 102.6(b).⁵ 11 CFR 102.17(a)(2).

3 The participants in a joint fundraising effort must either select a participating
4 committee to serve as their joint fundraising representative or establish a separate
5 political committee.⁶ 11 CFR 102.17(a)(1)(i). The joint fundraising representative shall
6 be a reporting political committee. *Id.* If the participants establish a separate political
7 committee to act as a fundraising representative, that committee must “collect
8 contributions, pay fundraising costs from gross proceeds and from funds advanced by
9 participants, and disburse net proceeds to each participant.” 11 CFR 102.17(b)(1).
10 Commission regulations also require the participants or the fundraising representative to
11 establish a separate depository account to be used solely for the receipt and disbursement
12 of the joint fundraising proceeds. 11 CFR 102.17(c)(3).

13 Joint fundraising participants must also enter into a written agreement, identifying
14 the fundraising representative and stating a formula for the allocation of fundraising
15 proceeds. 11 CFR 102.17(c)(1). Commission regulations require the fundraising
16 representative to retain the written agreement for three years and make it available to the

⁵ A collecting agent collects and transmits contributions to a separate segregated fund (“SSF”) that is related to the collecting agent, such as an affiliated committee or a connected organization. 11 CFR 102.6(b)(1), (2). As noted above, AFF and AFFPA represent that they are not affiliated and that AFF is not the connected organization for AFFPA. On the basis of this representation, AFF would not be a collecting agent of AFFPA (or another political committee) and is not, for that reason, prohibited from participating in joint fundraising. The Commission notes, however, that it has previously considered joint fundraising activities a relevant factor, among a number of other factors, in evaluating whether entities are connected or affiliated. *See, e.g.,* Advisory Opinion 1997-15 (Nickalo). The question of whether AFF is the connected organization for (or affiliated with) AFFPA is outside the scope of this advisory opinion. If AFF were to become a collecting agent of AFFPA (or any other political committee), it would not be able to participate in a joint fundraising committee.

⁶ If the participants establish a separate political committee to serve as their fundraising representative, that committee must not participate in any other joint fundraising effort. It may, however, conduct more than one joint fundraising effort for the participants. 11 CFR 102.17(a)(1)(i).

1 Commission upon request. *Id.* Finally, the fundraising representative must provide
2 appropriate disclaimers on every solicitation for contributions,⁷ as well as screen and
3 report all contributions received.

4 As a threshold matter, the Commission has never considered whether a
5 corporation such as AFF is an “unregistered ... organization” that can establish a joint
6 fundraising committee along with a political committee such as AFFPA. When the joint
7 fundraising rules were originally adopted prior to the Supreme Court’s decision in
8 *Citizens United v. FEC*, 558 U.S. 310 (2010), corporations were generally prohibited
9 from making both contributions and expenditures in connection with Federal elections,
10 and therefore would have been unable to participate in joint fundraising efforts such as
11 those proposed here. 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1)-(2).⁸

12 However, the plain meaning of the regulatory text appears to cover organizations
13 such as AFF and there is no other provision – such as those found at Part 300
14 implementing certain joint fundraising restrictions established by BCRA – that explicitly
15 prohibits such organizations from participating in regulated joint fundraising activities.⁹

⁷ In addition to the disclaimer requirements under 11 CFR 110.11, a joint fundraising notice must be included with every solicitation for contributions. This notice must include: the names of all participating committees in the joint fundraising activity; the allocation formula to be used for distributing the joint fundraising proceeds; a statement informing contributors that, notwithstanding the stated allocation formula, contributors may designate their contributions for a particular participant or participants; and a statement informing contributors that the allocation formula may change if a contributor makes a contribution exceeding the amount limitations under the Act and Commission regulations. See 11 CFR 102.17(c)(2)(i)(A)–(D).

⁸ The prohibition on corporate independent expenditures was invalidated in *Citizens United*. On December 15 of last year, the Commission approved an NPRM proposing certain changes in response to this aspect of the Court’s ruling. See Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 76 Fed. Reg. 80803 (Dec. 27, 2011). Documents related to Commission rulemaking proceedings are available at www.fec.gov/fosers.

⁹ 11 CFR 102.17(a) states that “[n]othing in this section shall supersede 11 CFR part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from

1 *See Orion Reserves Ltd. v. Salazar*, 553 F.3d 697, 707 (D.C. Cir. 2009) (an agency's
2 interpretation of its own regulations is entitled to deference when the plain language of
3 the regulation does not require another interpretation). Therefore, the Commission
4 concludes that AFF and AFFPA may form a joint fundraising committee together,
5 provided they adhere to the other requirements of the Act and Commission regulations,
6 including those described below.

7 Based on Requestors' representations, a Joint Committee involving AFFPA and
8 AFF would meet the requirements for establishing a lawful joint fundraising effort. First,
9 they plan to create and register a new political committee to serve as their joint
10 fundraising representative. This committee would be a "reporting political committee."
11 11 CFR 102.17(a)(1)(i). Second, they intend to enter into a written agreement naming
12 the new political committee as their joint fundraising representative. Third, they have
13 established a formula for allocating the joint fundraising proceeds and expenses. Fourth,
14 they plan to provide joint fundraising disclaimers on every solicitation for contributions
15 and follow all the recordkeeping and reporting requirements of section 102.17. Finally,
16 the joint fundraising committee would establish separate bank accounts that would
17 segregate contributions that are subject to the limitations and prohibitions of the Act from
18 those that are not.

19 Because AFF and AFFPA indicate they will comply with all provisions of the
20 joint fundraising committee rules at 11 CFR 102.17, they may engage in their proposed
21 activity, notwithstanding that AFF is a corporation.

transferring Federal funds for Federal election activities." 11 CFR 102.17(a). However, because AFF is not an organization whose activities are covered by Part 300, AFF's proposed joint fundraising activities are not restricted by the reference to Part 300 in 11 CFR 102.17(a).

1 Any joint fundraising effort that AFF and AFFPA establish, however, must
2 adhere to the prohibitions on corporate contributions and facilitation of contributions.
3 The Act and Commission regulations prohibit corporations from making direct
4 contributions to candidates, and contributions to political committees like AFFPA, which
5 make direct contributions in connection with a Federal election.¹⁰ 2 U.S.C. 441b(a); 11
6 CFR 114.2(b)(1); *see also United States v. Danielczyk*, 633 F.3d 611, 617-618 (4th Cir.
7 2012) (upholding federal prohibition on direct corporate contributions and distinguishing
8 it from prohibition on independent expenditures struck down in *Citizens United*);
9 *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1124-25 (9th Cir. 2011) (upholding
10 analogous municipal prohibition on direct corporate contributions). Commission
11 regulations also generally prohibit corporations from facilitating the making of
12 contributions that the corporation itself would be prohibited from making. 11 CFR
13 114.2(f)(1). “Facilitation” means using corporate resources to engage in fundraising
14 activities in connection with any Federal election. *Id.* Facilitation of fundraising
15 activities includes a corporation’s use of its customer, client, or other lists to solicit
16 contributions, unless the corporation receives advance payment for the fair market value
17 of the list. 11 CFR 114.2(f)(2)(i)(C). Facilitation also includes the failure to reimburse a
18 corporation within a commercially reasonable time for the use of corporate facilities. 11
19 CFR 114.2(f)(2)(i)(B).

¹⁰ A “contribution” includes “any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [Federal] election.” 2 U.S.C. 441b(b)(2); *see also* 2 U.S.C. 431(8); 11 CFR 100.52(a). “Anything of value” includes all in-kind contributions, including the provision of goods and services without charge or at less than the usual and normal charge. *See* 11 CFR 100.52(d)(1).

1 Here, AFF will be using its corporate resources to engage in joint fundraising with
2 AFFPA through the Joint Committee. However, AFF's participation in the Joint
3 Committee will not necessarily constitute a contribution to, or the facilitation of
4 contributions to, AFFPA.¹¹ AFFPA and AFF have indicated that each entity will pay the
5 Joint Committee's fundraising expenses in proportion to the funds received by the Joint
6 Committee on that entity's behalf. AFF, thus, will not be paying AFFPA's share of the
7 Joint Committee's expenses. To the extent that the Joint Committee incurs expenses –
8 such as, for example, start-up costs or the use of mailing lists – before each participant's
9 appropriate proportion of those expenses can be determined, AFFPA should advance
10 these start-up costs and be reimbursed by AFF later based on AFF's share of the costs as
11 specified in the written joint fundraising agreement.¹² Any advance paid by AFFPA
12 should include the cost of resources owned by AFF, such as donor or member lists, or the
13 use of AFF's name, trademarks or service marks. *See* 11 CFR 114.2(f)(2)(i)(C);
14 Advisory Opinion 2007-10 (Reyes).

¹¹ AFF also asks whether its joint fundraising activity through the Joint Committee would be treated as "Federal campaign activity" for purposes of determining whether AFF has the requisite "major purpose" to be deemed a political committee by the Commission. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (construing the term "political committee" to encompass only organizations that are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate"). The Commission concludes that AFF's activity in the Joint Committee may, but will not *necessarily* in all instances, constitute Federal campaign activity or, in itself, make AFF a political committee. Whether the joint fundraising constitutes "Federal campaign activity" will depend on its content. For example, AFF engages in what it refers to as "FEC-regulated activity," Advisory Opinion Request at 2, and solicitations for such activity would constitute Federal campaign activity.

¹² Advances made by a participant that exceeds its proportionate share of the fundraising costs are treated as contributions to the other participants. 11 CFR 102.17(b)(3)(ii). An excess advance by AFF, whether of funds or mailing lists, would be a prohibited contribution from AFF to AFFPA. *Id.*

1 Consistent with the requirements set forth above, the Commission concludes that
2 AFF and AFFPA may serve in a joint fundraising committee established under 11 CFR
3 102.17.

4 *Question 2: May AFF, AFFPA, AFFPA's non-contribution Carey account and/or an*
5 *IEOPC serve as participants in a joint fundraising committee?*
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7 For the reasons given in response to Question 1, AFF and AFFPA, including its
8 non-contribution account, and an IEOPC – may participate in a Joint Committee as
9 described, provided they adhere to the requirements described in the response to Question
10 1.¹³

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
14 of the facts or assumptions presented, and such facts or assumptions are material to a
15 conclusion presented in this advisory opinion, then Requestors may not rely on that
16 conclusion as support for its proposed activity. Any person involved in any specific
17 transaction or activity which is indistinguishable in all its material aspects from the
18 transaction or activity with respect to which this advisory opinion is rendered may rely on
19 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
20 conclusions in this advisory opinion may be affected by subsequent developments in the

¹³ Requestors ask whether AFFPA's non-contribution account may participate in the joint fundraising effort. AFFPA itself may participate in a joint fundraising committee regardless of the account it uses in this endeavor. A non-contribution account, however, is not a separate political committee but rather a separate account of AFFPA. *See Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011) (a nonconnected political committee that makes direct contributions to candidates may receive unlimited funds into a separate bank account for the purpose of financing independent expenditures); *see also* Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, Oct. 5, 2011, <http://www.fec.gov/press20111006postcarey.shtml>.

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
2 The cited advisory opinions are available on the Commission's Web site at,
3 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database
4 at http://www.fec.gov/searchao.

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6 On behalf of the Commission,
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10 Caroline C. Hunter
11 Chair